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IN THE

# Supreme Court of the United States

October Term 1971

No.....

71-353

*In re* Estate of

JOHN HORMAN,

Deceased.

*vs.*

THE STATE OF CALIFORNIA,

*Objector and Appellant,*

ULIANA ANDREEVNA GUMEN *et al.*,

*Claimants and Respondents.*

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**Petition for Writ of Certiorari to the Supreme Court of the State of California.**

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THE STATE OF CALIFORNIA,

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ULIANA ANDREEVNA GUMEN *et al.*,

*Claimants and Respondents.*

**Petition for Writ of Certiorari to the Supreme Court of the State of California.**

Petitioners Uliana Andreevna Guman, Evdokia Andreevna Lavrik, Anna Ivanovna Petlevany and Vera Ivanovna Vinichenko respectfully pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California entered in this proceeding on the 10th day of June, 1971.

## Opinions Below.

The Opinion of the court below is reported at 5 Cal. 3d 62, (1971), and is attached hereto and made a part hereof as Appendix "A". The Supreme Court of California adopted the Opinion of the Court of Appeals of the State of California, Fourth Appellate District, Division Two, except that Mr. Justice Peters appended a dissenting opinion which is attached as Exhibit "B"

herein. Judge James Judge in the Superior Court in and for the County of Orange, found for the petitioners and filed a Memorandum Opinion by letter dated February 19, 1969, a copy of which is attached hereto and made a part hereof as Exhibit "C", together with the Findings of Fact and Conclusions of Law filed March 17, 1969.

**Jurisdiction.**

Judgment and Opinion of the Supreme Court of California was issued on June 10, 1971. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

**Constitutional and Statutory Provisions Involved.**

U.S. Constitution, Fifth Amendment and Fourteenth Amendment; U.S. Constitution, Article I, §8; California Probate Code §1026; §1027; Code of Civil Procedure §1430. (See Appendix D).

**Questions Presented.**

1. Where the Probate law of California vests title to the estate of a California decedent in his heirs as of the date of death, may California thereafter deny due process and equal protection of the laws to a non-resident alien by confiscating the vested property interests of the non-resident alien solely by reason of the failure of the non-resident alien to file his claim within five years, while American citizens, resident or non-resident, and resident aliens, are allowed a longer time to claim their shares?

2. Whether California Probate Code §1026 requiring a non-resident alien to appear and claim his vested share of a California estate within five years violates the equal protection and due process provisions of the Fourteenth Amendment in that it places an unreasonable and arbitrary burden and requirement upon the non-resident alien not required of a non-resident citizen similarly situated?

3. Whether Probate Code §1026 denying to non-resident aliens property rights otherwise vested in them by the Probate laws of the State of California constitutes an arbitrary and unreasonable burden upon the foregin policy of the United States and violates basic principles of International Law by depriving a non-resident alien of his property rights in California without just compensation and for no justifiable public purpose?

4. Whether Probate Code §1026 violates the separation of powers provided for in Article I, §8 of the United States Constitution in that it permits and requires the State courts to confiscate the property of non-resident aliens within the State of California in such a discriminatory manner as to cause embarrassment to the foregin relations of the United States.

5. Whether Probate Code §1026 is part and parcel of a discriminatory scheme of laws designed by the State of California to distinguish arbitrarily and capriciously between the property rights of non-resident aliens and the property rights of citizens, resident and non-resident, and resident aliens, in disregard of the pro-

visions of the equal protection and due process clauses of the Fourteenth Amendments and the Separation of powers provision of Article I, §8.

**Statement of the Case.**

John Horman died intestate December 25, 1961 in Orange County, California. His heirs-at-law consisted of twenty-four persons[1], all residing in remote areas of the Soviet Union at the date of his death.[2]

At the time of Horman's death, California law contained a specific statute governing the rights of non-resident aliens to inherit.[3] Probate Code §259 provided in part that there must be reciprocal rights of inheritance with the foreign state in which the alien resided, otherwise the share of the non-resident alien heir would escheat to the State of California.[4]

Probate Code §259 was interpreted on September 12, 1961 by the California District Court of Appeal in *Estate of Gogabashvele,* 195 Cal. App. 2d 503, to exclude citizens of the Soviet Union from the right to participate in California estates by reason of the fact that, as a matter of California law, the Soviet Union was not reciprocal with California in matters of inheritance. The Supreme Court of California denied a hearing on November 8, 1961. The ruling became final and, under the California law of *Stare decisis,* a matter

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[1]A sister, children and grandchildren of pre-deceased full brothers, and the children and grandchildren of a half-brother.

[2]The places of residence spanned the Soviet Union from the Ukraine on the west to near Vladovostok on the east.

[3]In addition to §1026 at issue here.

[4]But this escheat statute permitted other more remote heirs to subsequently claim the estate. Probate Code §1026 permits no such subsequent claims and the forfeiture to the State is final.

of precedential effect (*Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450 (1962)).

Until August 2, 1966, when the Supreme Court of California ruled in *Estate of Larkin*, 65 Cal. 2d 60 (1966), that citizens of the Soviet Union could inherit from a California estate and that reciprocity did exist between the United States and the Soviet Union, citizens of the Soviet Union were effectively prohibited from inheriting in the State of California and efforts by Soviet citizens to claim estates in the State of California were futile.[5]

Twenty of the twenty-four heirs-at-law of John Horman did make appearances in the California court prior to the decision of the Supreme Court of California in *Estate of Larkin*, 65 Cal. 2d 60 (1966), but no effort was made to bring the matter to hearing in the Probate Courts of Orange County until subsequent to the decision in *Larkin*.

The four petitioners herein are direct descendants of a half-brother of the decedent residing in a peasant community in the Ukraine. The eldest brother of this family, Stepan Lavrik, filed a claim prior to the expiration of the five-year period required by Probate Code §1026. The four petitioners herein[6] did not present their claims until subsequent to the decision in *Estate of Larkin*, but prior to the commencement of trial on the issue of heirship in the Superior Court of Orange County. Their claim was therefore more than five years

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[5]The claimants in the *Estate of Larkin* saw their claims rejected by the District Court of Appeal on May 4, 1965, 44 Cal. Rptr. 731, and only secured their rights by review by the California Supreme Court.

[6]Following the Eastern Europe peasant tradition of allowing their eldest brother to act on behalf of the family.

after the date of death, but less than five years if the period in which the law of California excluded Soviet heirs from participating in California estates was tolled.

The issue of heirship was tried in Orange County without any question as to petitioners' compliance with Probate Code §1026 being raised by the State of California. The trial court ruled against all twenty-four claimants. The Court of Appeal reversed as to all twenty-four petitioners *Estate of Horman*, 265 Cal. App. 2d 796 (1968) and ordered a new trial.

One day prior to commencement of the second trial, the Attorney General of California filed a pleading contending that the four petitioners herein were barred by reason of Probate Code §1026. Probate Code §1026 provides that a non-resident alien must claim his share of a probate estate within five years or the share of the estate to which he would be otherwise entitled is permanently forfeited to the State of California.[7] As to all other beneficiaries of estates, if they do not make appropriate claim, the share goes either to other more remote heirs or escheats to the State of California with provision that the appropriate heir may claim at any time within five years of the date of escheat (see Probate Code §231].

The trial court rejected petitioners' claim that the State was estopped to raise the issue at such a late date and declined to hold Probate Code §1026 unconstitutional. The trial court gave judgment to the four petitioners (as well as the other twenty claimants), holding that the provisions of Probate Code §1026 had been tolled during the period that *Estate of Gogabashvele, supra* was the law of the State of California.[8]

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[7]See complete text in Appendix "D".

[8]See Opinion in Exhibit "C".

The State of California appealed from this decision in its entirety, but on March 3, 1970, the Court of Appeal dismissed the appeal as to those twenty of the twenty-four who had appeared within five years of the date of death, leaving the appeal effective only as to the four petitioners herein. Distribution to the twenty Soviet claimants was thereafter made.[9]

At each stage of the proceedings, commencing in the Superior Court [R.T. 155 ff.], in the Court of Appeal (Resp. Reply Br. 16 ff.; Resp. Supp. Br. 17 ff.), and the Supreme Court (Petition for Hearing, 23-44), petitioners in timely fashion raised all of the constitutional issues advanced herein.

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[9]In contention in this proceeding is approximately $40,000.00 determined by the court to be due to these four claimants but for the application of Probate Code §1026.

## REASONS FOR GRANTING THE WRIT.

### I.

### A Non-Resident Alien Acquiring Property in the State of California Is Entitled to Hold and/or Dispose of That Property Without Differentiation From the Restrictions Placed Upon Citizens or Resident Aliens to Dispose of Comparable Property. The Arbitrary Discrimination of Probate Code §1026 Is Violative of the Due Process and Equal Protection Provisions of the Fourteenth Amendment.

The Equal Protection Clause has been held to apply to persons "within its [the State's] jurisdiction" (*Johnson v. Eisentrager,* 339 U.S. 763, 771, 70 S. Ct. 936, 940 [1950]).

Under California law, upon the death of the decedent, the heirs-at-law succeed to their designated interests in the estate subject, under provisions of Probate Code §1026, to divestment. Their ownership interest in the property, however, is vested on death (*Estate of Lawrence,* 84 Cal. App. 2d 500, 505-506; *Estate of Sorensen,* 44 Cal. 2d 306, 308; *Estate of Romaris,* 191 Cal. 740, 744; *Estate of Pendergast,* 143 Cal. 135, 140).

Acquisition of a right to property within the state brings the non-resident alien within the jurisdiction of the State of California to require at the very least protection of the alien's rights to that specific property. These rights on a minimal basis must include elemental principles of due process and protection against discriminatory application of the laws of the State. The Supreme Court of California, for purposes of its opinion in this proceeding, assumed, without deciding, the validity of this proposition (*Estate of Hormen, supra,* at 74).

The issue presented by this case does not appear to have been directly resolved by the Court, but clearly the Mexican corporation involved in *Home Insurance v. Dick,* 281 U.S. 397, 50 S. Ct. 338, (1930) was a non-resident corporation, and involved therein was property held in the United States. The language of the court rested on due process but the result there is not distinguishable from that sought by the petitioners herein. Similarly, in *Russian Volunteer Fleet v. United States,* 282 U.S. 481 (1931), the sole connection between the Russian corpoation, as a non-resident alien, and the United States was that it had property in the United States. The court refused to permit the confiscation of the property of the non-resident alien corporation, even where the evidence indicated the property of American citizens was being confiscated in the nomeland of the alien corporation.

Today, when the requirements of international trade make it necessary that capital flow with relative freedom across international boundaries, cases like *Home Insurance* and *Russian Volunteer Fleet* illustrate the vital need that property interest of non-resident aliens be given fundamental and non-discriminatory protection in the United States. The same overriding reasons dictate that property rights acquired by other means by non-resident aliens, including inheritance, must be similarly accorded the protection of our laws.

Montana, in *In re Nossen's Estate,* (118 Montana 40, 152 P. 2d 216 [1945]), where the rights of a non-resident alien to inherit property had vested, held that due process prohibited the State from divesting the non-resident alien of his property rights based upon the subsequent passage of a reciprocity statute. The effect

of California's action under Probate Code §1026 as to the alien who loses his property rights arbitrarily and discriminatorily is the same as in Montana.

Whether we consider the issue one of due process or equal protection is immaterial. At bottom we are faced with the necessity of according elemental fair dealing to persons who are within our jurisdiction by reason of the vesting of an ownership interest in property; and not to arbitrarily deprive them of that property by casting them into an unprotected category known as "non-resident aliens."

We are not here discussing the type of equal protection which requires physical presence in the United States, such as equality in access to transportation, schools, housing, etc., We are talking about elemental fairness in treatment with relation to property rights. It therefore matters not whether we define the right in terms of equal protection or define it in terms of the accepted doctrine that even non-resident aliens are entitled to due process of law in matters relating to their property rights within the United States.

In *Sardino v. Federal Reserve Bank of New York,* 351 F. 2d 106, the Court asserts:

> "The due process clause speaks in terms not of taking, but of deprivation; we find it hard to say there is no deprivation when a man is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which may outrun his life . . .
>
> "The government's second answer that the constitution of the United States confers no rights on non-resident aliens is so patently erroneous in a case involving property in the United States that

> we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the government within our borders—and even to some without."

The *Sardino* court points out that our economic position is due in part to European investors who place funds at risk in the United States believing that they are protected by the constitutional gurarantees.

If persons who invest money in the United States without physically coming here are entitled to the equal protection of our laws, how can we accord less rights to those who acquire property by inheritance in the United States? In either case, the property holder is entitled to be accorded fundamental principles of fairness and equality under standards established by the Constitution. The treatment of these petitioners under Probate Code §1026 did not meet those standards.

## II.

## There Is No Acceptable State Purpose Justifying the Arbitrary Discrimination Against Non-Resident Aliens Contained in Probate Code §1026.

The California Supreme Court accepted for purposes of argument the proposition that the vesting of property rights in the non-resident alien gave to the alien the protection of the Fourteenth Amendment Due Process and Equal Protection clauses. The court, however, held that the California statutory scheme involved in Probate Code §1026 did not constitute an unconstitutional discrimination against non-resident aliens (*Estate of Horman, supra,* at 13).

There is no constitutional requirement of uniform treatment for all persons and legislative classification

is permissible when made for a lawful state purpose if the classification bears a rational relationship to that lawful purpose (*McGowan v. State of California*. 366 U.S. 420, 425-6; 81 S. Ct. 1101, 1104-1105 [1961]).

The State legislation challenged herein cannot be defended by any justification suggested in the court below.

The California Supreme Court recognized that alienage is a particularly suspect classification and one which requires special examination by Appellate Courts to be certain that the classification comports with the requirements of the Fourteenth Amendment (*Estate of Horman, supra,* at 75; *Purdy and Fitzpatrick v. State of California,* 71 Cal. 2d 587 [1969]).

The California court justifies Probate Code §1026 because the State of New Hampshire prohibits non-resident aliens from any inheritance rights under its laws. While Petitioners do not concede the validity of the New Hampshire law, the non-resident alien does not come under state jurisdiction as in California. California inheritance law vests rights to property in the State of California in the non-resident alien. California courts may not therefore, arbitrarily, as under probate Code §1026 divest them of that right based solely on status as a non-resident alien. While all non-resident aliens are treated alike, non-resident citizens of California need not appear within five years. The distinction rests solely on the fact of alienage and therefore is unsupportable.

The suggestion that the California statutory distinction rests solely on residency, is false on its face. An American citizen permanently residing in the Soviet Union on a farm next to that occupied by the petitioners herein would not be required to appear within five years, even

though his residence is identical with that of petitioners.[10]

The California court suggests State governmental concern that property within its borders should have an ascertainable title within a reasonable period of time so that it can be sold, developed or otherwise dealt with (*Estate of Horman, supra,* at 77). A non-resident citizen failing to claim his share within five years does not forfeit his claim to the State of California. A resident alien or a resident citizen who fails to assert his interest within five years has five years *after the property escheats to the State of California* under the normal escheat statute.[11] to claim his interest. Thus, California seems only concerned to ascertain title to property belonging to non-resident aliens. As applied to this case the state confiscates property as to which rightful title has been ascertained.

The distinction that "citizens and resident aliens are likely to have substantial contacts and relationship with the State, directly or indirectly, through the national government or other state governments, that non-resident aliens lack," is true, but meaningless in seeking justification for discriminating against non-resident aliens. Clearly, if Estate property has escheated to the State of California, it is because some citizen or resident alien (or non-resident alien) has not had sufficient connection with the government to acquire knowledge of the existence of his right. To rest the invidious distinction upon this matter of "contact and relationship with the State," is patently false. The very nature of escheat indicates a "non-relationship" with the state.

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[10]All persons other than non-resident heirs are governed by the general principles of escheat found in Probate Code 1027.

[11]Probate Code 1027.

## III.

## International Law Standards of Justice Prohibit Discrimination Against Aliens Who Hold Property Within the State.

The fundamental applicable principles of International Law are in essence the basic concepts of due process of law and equal protection of law required by the Fourteenth Amendment to the Constitution of the United States.

In a world increasingly small and increasingly interdependent our courts have recognized that "our laws may not be applied in contravention of fundamental human principles of law as reflected by international law" (*Sociedad Nacional de Honduras v. Marineros de McCullough*, 201 F. Supp. 82 [1962]).

The principles of International Law violated by California Probate Code §1026 are found in §§165, 166 and 185 of the *Restatement, Foreign Relations Law* 2d. The Comment to §165 points out that even granting an alien the principle of "national treatment," (that is, the same standard of justice as a national) is not always sufficient and that an international standard of justice must be observed in the treatment of aliens, even if the state does not observe it in its treatment of its own nationals (see Elihu Root in 4 Am. Jour. Int. Law 521).

Under §166 of the *Restatement*, an alien may not be discriminated against even though he is not a resident if he has "lawfully acquired an interest in property subject to the jurisdiction of the state."

Under §185, property of a non-resident alien may be taken only if a reasonable provision is made for payment of just compensation.

Probate Code §1026 violates these fundamantal requirements of International Law. Probate Code §1026 permits the State of California to confiscate without just compensation the property of a non-resident alien simply and solely because that non-resident alien does not appear and claim that property within a time period shorter than that required of citizens and resident aliens. Such a statute does not comport with the fundamental principles of International Law and must not be upheld by this Court.

Any violation of International Law by a state constitutes a violation of the exclusive foreign relations power of the Federal Government as considered hereinafter.

## IV.

## Where a State Law Without Rational Basis Discriminates Against Non-Resident Aliens in the Ownership of Property, Such Statute Is an Unconstitutional Infringement on the Exclusive Power Over Foreign Relations Vested by the United States Constitution in the Federal Government.

*Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664 (1969), found that requiring an alien to establish that reciprocal rights of inheritance existed with the country of the alien, unconstitutionally impinged upon the exclusive power of the Federal Government over foreign relations.

That same principle applies to Probate Code §1026 of the State of California Probate Code.

In part the rationale for *Zschernig* was potential embarrassment to foreign policy of the United States. Here the California statute permits a non-resident alien to claim vested property in four years, eleven months,

twenty-nine days; but forfeits that vested interest to the State if he claims in five years and one day, regardless of the explanation or reason for the failure to claim. Where the law permits claims by its own citizens or resident aliens subsequent to the five-year period and denies the same right to non-resident aliens, the embarrassment to American foreign policy is clear.

In *Bethlehem Steel Corporation v. Department of Water and Power*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), California concedes the undue interference with the conduct of foreign relations by its statute prohibiting foreign bidding on California government contracts. The arbitrary forfeiture of an alien's vested property interest to the State of California itself is more likely to cause embarrassment to our foreign relations than a refusal to permit a foreign company to bid on a contract. Yet in *Bethlehem Steel*, the Court said that "the nation as a whole would be held to answer if a state created difficulties with a foreign power." The California court said there are no "contravailing state policies which are served by the retention of such an act." How then can the more patent discrimination involved in the instant case by supported?

It is no longer possible to merely look at the wording of the statute to evaluate its effect upon the foreign relations exclusive power of the Federal government (*Estate of Kraemer*, 276 Cal. App. 2d 715 [1969]). One must look to the substance and implications of the statute[12] (*United States v. Pink*, 215 U.S. 203, 233, 62 S. Ct. 552 [1942]). The courts need not await

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[12]See *Hines v. Davidowitz, supra*, 64 where the Court said "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from imagined wrongs to another's subjects inflicted, or permitted by a government.

an instance of actual conflict to strike down a state law which purports to regulate a subject reserved exclusively to the Federal government (*Purdy and Fitzpatrick v. State of California,* [71 Cal. 2d 566 (1969); *Gerry of California v. Superior Court,* 32 Cal. 2d 119 [1948]).

It is naive and "provincial" to assume any longer that a statute which so patently discriminates against non-resident aliens will not "bear a particular onus to foreign nations since it may appear to be a product of selfish provincialism rather than an instrument of justifiable policy" (*Bethlehem Steel Corporation v. Department of Water and Power,* 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 [1969]). "The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring . . .[18] citizens and resident aliens over non-resident aliens with regard to property rights.

Such a result must detrimentally affect our foreign relations in more than a "persistent and subtle way" (*Zschernig v. Miller, supra,* 440; *Hines v. Davidovitz,* 312 U.S. 52, 64, 61 S. Ct. 399, 402 [1941]).

In this case, no justifiable State policy dictates that those non-resident heirs who filed their formal claim prior to five years could take their vested interest in the estate, but petitioners who by inadvertence filed in five years and three months, must have their vested interest confiscated by the State of California under Probate Code §1026.

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[18]See *Purdy & Fitzpatrick v. State,* 71 Cal. 2d 566 (1969).

V.

**Probate Code 1026 Is Part of an Invidious Pattern of Discriminatory Legislation Directed Against Aliens by the State of California and Must Be Struck Down as Have Most of the Other Similarly Directed Laws.**

California, like many other states, has over the years legislated in a discriminatory manner against aliens and other groups against whom the prejudices of the majority of the legislature have from time to time been directed.

Thus, over the years legislation involving alien land laws *Haruye Masaoka v. People,* 36 Cal. 2d 883 (1952); miscegenation *Perez v. Lippold,* 32 Cal. 2d 711 (1948); alien bidding on state contracts *Bethlehem Steel Corporation v. Department of Water & Power,* 276 Cal. App. 2d 221 (1969); alien fishing rights *Takahashi v. Fish and Game Commn.,* 334 U.S. 410 (1948); restrictive licensing laws *Yick Wo v. Hopkins,* 118 U.S. 350 (1886); discrimination against alien inheritances *Estate of Kraemer,* 276 Cal. App. 715 (1969); and discrimination in employment of aliens *Purdy and Fitzpatrick v. State of California,* 71 Cal. 2d 566 (1969), have been held unconstitutional.

All of these statutes had in common that they were "the product of selfish provincialism, rather than an instrument of justifiable policy."[14]

While the specific motivation of each act may have been different, the general motivation in each case was to reflect a community [or legislature] prejudice which seemed at that time to require the legislature to strike

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[14]*Bethlehem Steel Corporation v. Department of Water & Power,* 276 Cal. App. 2d 221 (1969).

out with arbitrary and discriminatory legislation, placing the unhappy and unpopular group in an inferior position with relation to all other elements of the society. One by one, either the State of California or this Court, has, when offered the opportunity, struck down the invidious legislation. This Court should now grant Certiorari in order to add Probate Code 1026 to the growing list of anachronistic laws which no longer comport with our concepts of fairplay and equality, and which by their very nature interfere with the fundamental principles of International Law.

**Conclusion.**

This Court should grant Certiorari to correct the erroneous result below. In a world growing increasingly small and in which travel and business daily increase the relationships between citizens and foreign countries, a law which so patently discriminates against property interests in the State of California only by reason of the status of non-resident alien cannot be allowed to stand.

It is essential that this Court now make clear that a state may no longer discriminate against persons holding property within its borders solely by reason of alienage.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,
By EDWARD MOSK,
*Attorneys for Petitioners.*

## APPENDIX A.

In the Supreme Court of the State of California, in Bank.

Estate of John Horman, Deceased. Vasilisa Pavlovna Melenko et al., Claimants and Respondents, v. State of California, Objector and Appellant. L.A. 29-832 (Super. Ct. 932697).

BY THE COURT

In this proceeding to determine heirship, the State of California appeals from a decree ordering that certain nonresident aliens are entitled to distribution of specified proportionate shares of decedent's estate.

After decision by the Court of Appeal, Fourth Appellate District, Division Two, reversing the judgment of the trial court, we granted a hearing in this court for the purpose of giving further consideration to the issues raised. Having made a thorough examination of the cause, we have concluded that the opinion of the Court of Appeal prepared by Justice Kaufman and concurred in by Acting Presiding Justice Tamura and Justice Kerrigan correctly treats and disposes of the issues involved and we adopt such opinion as and for the opinion of this court. Such opinion (with appropriate deletions and additions) is as follows*

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*Brackets together, in this manner [ ] *without enclosing material,* are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. In so doing, we adhere to a method of adoption employed by us in the past. (See Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 311, fn. 2, and cases there cited.)

The State of California appeals from a decree determining that 24 nonresident aliens are entitled to inherit the estate of John Horman. The state contends that four of the heirs (hereinafter claimants) did not "appear and demand" their interest in the estate within five years from the "time of succession" as required by Probate Code, section 1026, and that these interests should escheat to the state.[1]

*Facts*

John Horman died intestate December 25, 1961, in Orange County, leaving an estate in excess of $450,000. His survivors are 24 persons, including the claimants herein, who, at the date of his death were, and now are, citizens of the U.S.S.R. and reside in various parts of the Soviet Union. The public administrator was appointed administrator of the estate in January 1962. In January 1965, less than five years after the date of death, the State of California filed a petition to determine heirship [pursuant] to Probate Code, section 1080, alleging that the decedent left no surviving spouse or kindred; that there were no heirs entitled to take the estate; and that the State of California was entitled to distribution of the estate as escheated property. There was no allegation of any kind indicating that the state was relying on any failure to comply with Probate Code, section 1026. Indeed, such would have been improper at that point, for the five years

[1]The appeal was from the entire judgment, purportedly directed at all 24 survivors. In the briefs, however, the state asserted no claims or contentions with respect to 20 of the survivors and on March 3, 1970, we granted respondents' motion to dismiss as to all of the survivors except Uliana Andreevna Gumen, Evdokia Andreevna Lavrik, Anna Ivanovna Petlevany, and Vera Ivanovna Vinichenko. These four, therefore, are the remaining respondents herein and, as indicated, will be referred to as the claimants.

had not then elapsed. For purposes of Probate Code, section 1026, "time of succession" means date of death. (Estate of Caravas, 40 Cal.2d 33, 37-38 [250 P.2d 593]; Estate of Laurence, 84 Cal.App.2d 500, 504 [191 P.2d 109].)

Within five years of the date of death, all of the survivors except claimants "appeared and demanded" by filing in the heirship proceeding statements of interest or, in one case, a separate petition to determine heirship. Included in one of the statements of interest was the claim of Stepan Andreevich Lavrik.

On March 17, 1967, after the expiration of the five-year period, and five days before the first trial, a "Second Amended Statement of Interest" was filed by Stepan Andreevich Lavrik in which he alleged that the statements of interest and amended statement of interest theretofore filed were true and correct except that, in addition to himself, his parents had had seven other named children; that the surviving children and the survivors of those children who were deceased were those persons named in the "Second Amended Statement of Interest," to wit, the four claimants herein. It was stated that the "Second Amended Statement of Interest" was filed on behalf of claimants and was intended as a statement of interest on their behalf. This document was signed by Slaff, Mosk & Rudman by Edward Mosk as "Attorneys for Petitioner." It bears at the top of the first page under the printed name and address of said attorneys the designation "Attorneys for Claimants." (Italics supplied.)

On March 22, the matter went to trial on the aforesaid pleadings. At trial it was the state's position that the survivors had not sufficiently established their re-

lationship to the decedent. At no time during the trial did the state assert that claimants had failed to comply with the Probate Code, section 1026, nor did the state at this first trial assert that Slaff, Mosk & Rudman were not authorized to represent claimants nor that claimants were not properly before the court. Judgment was for the state. The survivors made motions to reopen and for new trial. Both motions were denied. All 24 survivors, including claimants, appealed from the judgment and the orders denying these motions. On appeal, the judgment was reversed. (Estate of Horman, 265 Cal.App.2d 796 [71 Cal.Rptr. 780].) On the appeal no mention was made of the Probate Code, section 1026 problem, and the problem was not expressly determined.

On Monday, February 3, 1969, one day prior to the date set for retrial, the state filed a pleading entitled, "Answer to Amended Statement of Interest," in which, for the first time, the state asserted claimants' failure to "appear and demand" within the five-year period prescribed by section 1026.[2]

When the matter came on for trial the next day, counsel for claimants moved to strike the state's "Answer to Second Amended Statement of Interest," arguing vigorously that the state had waived the requirement of section 1026 by failing to assert it until so late a date and should be estopped from now attempting to do so. At the conclusion of the trial, the motion to strike was renewed.

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[2]Actually, the pleading did not specify the code section (see Code Civ. Pro., § 458), but the court permitted an amendment by interlineation at the conclusion of the trial to insert the words "as required by Probate Code, section 1026."

The trial court declined to strike the state's answer, but gave judgment for claimants, concluding that "Probate Code 1026 requiring [nonresident] alien heirs to claim within five years of date of death of the decedent was tolled between September 12, 1961 and August 2, 1966."

This conclusion as based upon the court's finding as follows: "11. . . . . It is true that said claimants had no effective manner in which to appear herein during the period of time commencing with the opening of the within estate and ending upon their appearance herein in that between November 8, 1961 when hearing was denied by the Supreme Court of California in Estate of Gogobashvele [*sic*], 195 CA2d 503, and August 2, 1966 when the Supreme Court changed the law of California in Estate of Larkin, 65 C2d 60, the law of the State of California prevented alien heirs residing in the USSR, irrespective of the merits of their claims in California estates, from inheriting their shares of California estates by reason of the operation of Probate Code 259 as interpreted in Estate of Gogobashvele [*sic*]. That to have required said claimants to have appeared herein under such state of law would have required them to perform an idle act in that said claimants, during such period, were unable to obtain any effective relief in the courts of this state, and to that extent the courts of this state were effectively closed to them."

*Contentions*

On this appeal claimants contend (1) that the trial court was correct in its conclusion that the period prescribed by Probate Code, section 1026 was tolled; (2) that, even if the trial court's conclusion was erroneous, the state had waived the requirement of the section and

was precluded from asserting it at the second trial; and (3) that, if the judgment cannot be sustained on either of these bases, Probate Code, section 1026 is unconstitutional for a number of reasons.

The state contends (1) that the trial court was incorrect in concluding that the five-year period prescribed by section 1027 was tolled, and (2) that in any event, claimants still have not properly appeared and demanded because the "Second Amended Statement of Interest" was not filed by them but by Stepan Lavrik and *his* attorneys.

*Tolling*

The state urges that the period prescribed in Probate Code, section 1026 is not a statute of limitations but rather, a substantive aspect of our probate law, divesting a nonresident alien of his interest if he fails to appear and demand within the time prescribed. The cases do indicate the substantive nature of the section. (See Estate of Sorensen, 44 Cal.2d 306, 308 [281 P. 2d 870]; Estate of Romaris, 191 Cal. 740, 744 [218 P. 421]; Estate of Pendergast, 143 Cal. 135, 140 [76 P. 962]; Estate of Laurence, *supra*, 84 Cal.App.2d 500, 505-506.) Be that as it may, however, it is established that the five-year periods prescribed by sections 1026 and 1027 of the Probate Code are subject to tolling under appropriate circumstances. (Estate of Caravas, *supra*, 40 Cal.2d 33, 41-42; Estate of Spinosa, 117 Cal.App.2d 364, 370-472 [255 P.2d 843].)

The question remains, however, whether on the facts of the instant case, the court below was justified in finding the period tolled. Claimants urge that it would have been futile for them to "appear and demand" between the decision in Estate of Gogabashvele, 195 Cal.

App.2d 503 [16 Cal.Rptr. 77], and the decision in Estate of Larkin, 65 Cal.2d 60 [52 Cal.Rptr. 441]. *Gogabashvele* was decided September 12, 1961 and held that reciprocal rights of inheritance as were required by section 259 of the Probate Code[3] did not exist between the United States and the U.S.S.R. *Larkin* was decided August 2, 1966 and, in effect, disapproved *Gogabashvele*. Claimants call our attention to cases holding that, despite mandatory language, the five-year period prescribed in Code of Civil Procedure, section 583 for bringing a case to trial is tolled by circumstances showing physical or legal impossibility, futility or such impracticability as to amount to practical impossibility (Brunzell Constr. Co. v. Warner, 2 Cal.3d 545, 550-551 [86 Cal.Rptr. 297, 468 P.2d 553]; Rose v. Knapp, 38 Cal.2d 114, 117 [237 P.2d 981] and cases there cited; Christin v. Superior Court, 9 Cal.2d 526, 530-533 [71 P.2d 205, 112 A.L.R. 1153]), and urge that we apply the doctrine of these cases to Probate Code, section 1026.

We could agree with claimants that the implied exception found in the cases deali .g with Code of Civil Procedure, section 583 should be, on a proper showing, applied to Probate Code, section 1026. (Cf. Estate of Caravas, *supra*, 40 Cal.2d 33, 39-41.) The difficulty is that the circumstances presented by the case at bench do not demonstrate legal or physical impossibility, practical impossibility or futility. In the first place, notwithstanding the rationale of decision (see Estate of Larkin, *supra*, 65 Cal.2d at pp. 80-84), *Gogabashvele* could only decide that in that case the existence of re-

[3]Probate Code, section 259 has since been held unconstitutional. (Estate of Kraemer, 276 Cal.App.2d 715 [81 Cal.Rptr. 287].)

ciprocal inheritance rights was not established. Claimants in the case at bench were in no way prevented by that case from presenting their claim and presenting proof of a change in the law or administration of the law of the U.S.S.R., nor were they prevented from challenging the soundness of the reasoning in *Gogabashvele*. That is precisely what was successfully done by the claimants in *Larkin*. Moreover, the other 20 survivors herein did not find it impracticable or futile to "appear and demand" within the five-year period notwithstanding *Gogabashvele*, and there is nothing in the record to indicate that claimants herein relied on *Gogabashvele* in failing to "appear and demand" within the prescribed time.

Under claimants' tolling theory, whenever a precedent was overturned recognizing a right of action theretofore denied by case law, all persons who had been aggrieved between the decision of the precedent case and the decision of the overruling case could then file suit, no matter how many years had elapsed between. Such a proposition cannot be sustained. A contention identical in principle was rejected in Bates v. Gregory, 89 Cal. 387, 392-397 [26 P. 891].

We conclude, therefore, that the trial court's finding and conclusion that the five-year period prescribed by section 1026 was tolled in the case at bench are erroneous.

*Have Claimants Now Appeared?*

Before turning to the discussion of more serious problems, we deal briefly with the contention that, even now, claimants have not "appeared and demanded" because the "Second Amended Statement of Interest" was made on their behalf by Stepan Lavrik and the attorneys acting on his behalf.

There is no prescribed procedure for "appearing and demanding." (Estate of Sorensen, *supra,* 44 Cal.2d 306, 309; Estate of Aufret, 187 Cal. 34, 37 [200 P. 946]; State v. Smith, 70 Cal. 153, 156 [12 P. 121].) It is not contended that a person may not "appear and demand" by filing a statement of interest signed by his attorney in response to a petition to determine heirship. (Cf. Lyons v. State of California, 67 Cal. 380, 383-384 [7 P. 763].) Indeed, that is the manner in which the other heirs proceeded in the case at bench.

It appears to be the Attorney General's argument that the "Second Amended Statement of Interest" was signed by the attorneys not as attorneys for claimants but as attorneys for Stepan Lavrik. This contention is not supported by the record. Implicit, if not expressed, in the trial court's finding number 11, above, and the judgment is a finding that claimants did "appear and demand," albeit belatedly. This finding is supported by the hearing on the "Second Amended Statement of Interest," wherein the attorneys indicate that they represent "Claimants." (Italics supplied.) Moreover, the question of the attorneys' authority to represent claimants was not presented to the trial court by the state, and it cannot assert this matter for the first time on appeal. (Cf. Estate of Marshall, 120 Cal. App.2d 747, 752 [262 P.2d 42] [disapproved on different grounds in Kusior v. Silver, 54 Cal.2d 603, 616 (7 Cal.Rptr. 129, 354 P.2d 657)]; and see Algeri v. Tonini, 159 Cal.App.2d 828, 832 [324 P.2d 724].)

*Waiver - Estoppel - Law of the Case*

Claimants contend that by failing during the first trial to raise the issue, the state waived the five-year requirement of Probate Code, section 1026 and was

estopped to assert it [at] the second trial. It is generally held that a defense based on a statute of limitations is waived unless it is pleaded or presented to the trial court in some fashion. (Bliss v. Sneath, 119 Cal. 526, 528 [51 P. 848]; Taylor v. Sanford, 203 Cal. App.2d 330, 345 [21 Cal.Rptr. 697].) The state contends, however, that after the reversal on the first appeal in this court, the posture of the case was as if it had not been tried, and the state could amend its pleadings in the discretion of the trial court. (See 3 Witkin, Cal. Procedure (1954), pp. 2382-2383 and cases there cited.) This contention must prevail. While piecemeal litigation is to be discouraged, and while in the interest of the orderly administration of justice, the trial court should exercise caution in permitting the amendment of pleadings after trial and appeal (Dressler v. Johnston, 131 Cal.App. 690, 695 [21 P.2d 969]), nevertheless, such amendment is a matter within the discretion of the trial court (Trower v. City and County, 157 Cal. 762, 769 [109 P. 617]; see Dressler v. Johnston, *supra,* at p. 694.) The *Trower* case expressly approved the trial court's exercise of discretion in permitting an amendment to set up a defense of limitations not raised in the first trial or appeal. (See also Copp v. Millen, 11 Cal.2d 122, 131 [77 P.2d 1093].)

When the state first filed its petition to determine heirship, the section 1026 problem did not exist, inasmuch as five years had not passed since the death of the decedent. The problem first arose, not expressly but implicitly, at the time of the filing of the "Second Amended Statement of Interest." But this was only five days prior to the first trial, and it is perhaps understandable that the problem was overlooked by the

state in the first trial. When the state placed the matter in issue at the second trial, claimants did not claim surprise or request a continuance. Their counsel fully and articulately presented to the trial court all of the arguments advanced and most of the authorities cited on this appeal. Nor is it suggested that any additional evidence in respect to the issue might have been adduced. Under these circumstances, the trial court acted within its discretion in permitting the state to assert the issue at the second trial. (Trower v. City and County, *supra*, 157 Cal. 762.)

At our request, the parties have treated in their briefs the question whether the state is foreclosed from raising the section 1026 problem by the doctrine of law of the case. Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in the prior appeal. (DiGenova v. State Board of Education, 57 Cal. 2d 167, 179 [18 Cal.Rptr. 369, 367 P.2d 865].) As an exception to the general rule, the doctrine is also held applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal. (Nevcal Enterprises v. Cal-Neva Lodge, Inc., 217 Cal.App.2d 799, 804 [32 Cal.Rptr. 106]; see 3 Witkin, Cal. Procedure (1954) p. 2429.) The questions presented and determined on the prior appeal in this case were whether the survivors had established the identity of the decedent and their relationship to him, the admissibility of certain evidence, the discretion of the trial court in denying the motions to reopen and for new trial and the trial court's failure to rule on the admissibility of certain evidence. (Estate of Horman, *supra*, 265 Cal.App.2d 796.) The Probate Code, section 1026 problem was not raised

by either party and was not expressly determined by the court. Neither can it fairly be said that determination of the issue was essential to the decision. We have concluded, therefore, that the decision on the prior appeal did not foreclose the state from asserting this matter at the second trial.

*Constitutionality of Probate Code, Section 1026*

Claimants' contentions for unconstitutionality are numerous and somewhat interrelated. Perhaps the most difficult questions are posed by claimants' contention that the statutory scheme of which Probate Code, section 1026 is a part constitutes an invidious discrimination against nonresident aliens depriving them of equal protection of laws under the Fourteenth Amendment to the United States Constitution.

It is well established that the equal protection clause of the Fourteenth Amendment applies to aliens within the territorial jurisdiction of a state (Truax v. Raich, 239 U.S. 33, 39 [60 L.Ed. 131, 134, 36 S.Ct. 7, 9-10]; Yick Wo v. Hopkins, 118 U.S. 356, 369 [30 L. Ed. 220, 226, 6 S.Ct. 1064, 1070]; Purdy & Fitzpatrick v. State of California, 71 Cal.2d 566, 578 [79 Cal.Rptr. 77, 456 P. 2d 645].) We have been cited to no case, however, applying the equal protection clause to a nonresident alien. Indeed, the equal protection clause applies by its language only "to any person within its [the state's] jurisdiction," and there is some indication in the cases that it is inapplicable to nonresident aliens. (See Johnson v. Eisentrager, 339 U.S. 763, 771 [94 L.Ed. 1255, 1262, 70 S.Ct. 936, 940]; Cermeno-Cerna v. Farrell, 291 F.Supp. 521. 528; Moody v. Hagen (1917) 36 N.D. 471 [162 N.W. 704, 706-707].) As has previously been noted, how-

ever upon the death of the decedent, claimants succeeded to interests in the estate of the decedent subject to divestment (Estate of Sorensen, *supra,* 44 Cal.2d 306, 308; Estate of Romaris, *supra,* 191 Cal. 740, 744; Estate of Pendergast, *supra,* 143 Cal. 135, 140; Estate of Laurence, *supra,* 84 Cal.App.2d 500, 505-506), and it is urged that the ownership of such property interests in the State of California constitute[s] claimants as persons "within the jurisdiction." (See 51 Georgetown L.Rev. 470, 484-485; see also 47 Iowa L.Rev. 105, 114-115; and cf. 28 U.Chi.L.Rev. 1, 5-10.)

Assuming, without deciding, the validity of the latter proposition, we are not persuaded that the statutory scheme constitutes an unconstitutional discrimination against nonresident aliens. The major contention is that by virtue of Probate Code, section 1026 and Code of Civil Procedure, section 1336 non-resident aliens must "appear and demand" within five years from the date of the decree making distribution. It is argued that there is no valid purpose for the state's imposing a shorter period for nonresident aliens than for other persons and that, even if such purpose can be divined, the imposition of the shorter period for nonresident aliens is irrational and contrary to logic and fairness in that, if anything, a nonresident alien, because of his remoteness, should be allowed a longer period in which to "appear and demand."

There is no constitutional requirement of uniform treatement. (In re Ricky H., 2 Cal.3d 513, 522 [86 Cal.Rptr. 76, 468 P.2d 204]; Whittaker v. Superior Court, 68 Cal.2d 357, 367 [66 Cal.Rptr. 710, 438 P. 2d 358]; Bilyeu v. State Employees' Retirement System, 58 Cal.2d 618, 623 [24 Cal.Rptr. 562, 375 P.2d 442].) Legislative classification is permissible when

made for a lawful state purpose and when the classification bears a rational relationship to that purpose. (McGowan v. Maryland, 366 U.S. 420, 425-426 [6 L.Ed.2d 393, 399, 81 S.Ct. 1101, 1104-1105]; Royster Guano Co. v. Virginia, 253 U.S. 412, 415 [64 L. Ed. 989, 990, 40 S.Ct. 560, 561]; Whittaker v. Superior Court, *supra,* 68 Cal.2d 357.) "Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. . . . [citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." (Sacramento M.U. Dist. v. P.G. & E. Co., 20 Cal.2d 684, 693 [57 P.2d 506]; Bilyeu v. State Employees' Retirement System, *supra,* 58 Cal.2d 618, 623; McGowan v. Maryland, *supra,* 366 U.S. 420 [6 L.Ed.2d 393, 81 S.Ct. 1101]; In re Ricky H., *supra,* 2 Cal.3d 513.)

We recognize that a stricter standard is applied in testing legislation involving "suspect classifications" such as classifications based on race, nationality or alienage or involving "fundamental interests" such as the right to vote, the right of interstate movement and the right to seek employment. (Purdy & Fitzpatrick v. State of California, *supra,* 71 Cal.2d 566, 578-579 and authorities there cited.) However, the distinction in the statutory scheme in question is not, strictly speaking, based upon alienage. Resident aliens are treated the same as citizens. The point of distinction is residency as opposed to nonresidency. Nor is the distinction based on race or nationality. The statutory scheme applies to all nonresident aliens alike, regardless of their race or

nationality. Neither can the interests here involved be classified as fundamental. " 'Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the federal constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction.' (Irving Trust Co. v. Day (1942) 314 U.S. 556, 562 [86 L.Ed. 452, 457, 62 S.Ct. 398, 137 A.L.R. 1093].) 'So broad is the power of the state to determine the devolution of title to the property of a person dying and leaving property within its boundaries that it may take the property itself and deny any right of anyone to succeed thereto either by will or by succession. . . .' (Estate of Zimmermann (1955) 132 Cal. App.2d 702, 704 [283 P.2d 68]; see also Estate of Bevilacqua (1948) 31 Cal.2d 580, 582 [191 P.2d 752]; Estate of Knutzen, *supra,* 31 Cal.2d 573, 578 [191 P.2d 747], and cases cited.)" (Estate of Larkin, *supra,* 65 Cal.2d 60, 80-81.) There being no "suspect classification" or "fundamental interest" involved, the stricter standard discussed and applied in Purdy & Fitzpatrick v. State of California, *supra,* is not here applicable.

The statutory scheme of which Probate Code, section 1026 is a part appears to us to have two purposes, both of which constitute legitimate state governmental concerns. Obviously, the state has a legitimate concern that property within its borders should have an ascertainable title within a reasonable period of time so that it can be sold, developed and otherwise dealt with, and one purpose of the statutory scheme is to fix a time at which title can be definitely ascertained. A

second purpose would appear to be the state's preferring itself over nonresident aliens, at least when they have not appeared and demanded within the five-year period. This, too, is a permissible exercise of the state's power. (Cf. United States v. Burnison, 339 U.S. 87, 95 [94 L.Ed. 675, 682-683, 70 S.Ct. 503, 508]; see also Estate of Zimmermann, *supra,* 132 Cal.App. 2d 702, 705.)

The distinction between nonresident aliens and other persons is rationally related to these purposes. We think the rational connection between the distinction and the purpose of the state's preferring itself to a potential heir is obvious. Citizens and resident aliens are likely to have substantial contacts and relationships with the state, directly or indirectly through the national government or other state governments, that nonresident aliens lack. (See, discussing such contacts and relationships, Moody v. Hagen, *supra,* 36 N.D. 471, 486.) In recognition of these connections and relationships, it is not unreasonable that the state should defer its power of escheat as to resident aliens and citizens for a longer period than as to nonresident aliens.

These same considerations rationally connect the distinction to the other purpose of the statutory scheme. As already noted, the existence of unascertainable property titles constitues a problem for and a burden to the state. Final escheat of the property to the state removes the problem and the burden. Once again, however, it is not unreasonable for the state, in deference to and recognition of its more probable relationship to and connections with citizens and resident aliens, to indulge such persons in a somewhat longer period prior to final escheat than that accorded nonresident aliens.

Claimants' argument that, because of their remoteness, they should be accorded a longer period of time than others in which to "appear and demand" is not without logic. It must be recognized, however, that this very remoteness serves to distinguish the non-resident alien and to support the distinction and classification found in the legislation. Because of the remoteness of nonresident aliens and their probable total lack of contact with the state, it would not be unreasonable for the state to conclude that if no non-resident heir has appeared within five years from the death of the decedent, none is likely thereafter to be discovered. Moreover, this argument of claimants is misdirected. It is more appropriately addressed to the Legislature. Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature. (Griswold v. Connecticut, 381 U.S. 479, 482 [14 L.Ed. 510, 513, 85 S.Ct. 1678, 1680]; People v. Hurd, 5 Cal.App.3d 865, 877 [85 Cal. Rptr. 718].) Having determined that the statutory scheme serves a legitimate state purpose and that the classification made has a rational relationship to that purpose, the court's function is at an end.

Claimants also urge that the statutory scheme is unconstitutionally discriminatory as to nonresident aliens who *have* "appeared and demanded" within the prescribed time and, possibly, even as to citizens who might claim to inherit through a nonresident alien heir who had failed to "appear and demand" which the prescribed time. This argument is based upon the proposition that, where a nonresident alien heir exists but fails to "appear and demand" within the prescribed time, his portion of the estate does not revert to the residue of the estate to be distributed to other eligible heirs, but,

instead, is escheated to the state (Estate of Pendergast, *supra*, 143 Cal. 135, 140, Estate of Meyer, 107 Cal.App.2d 799, 809 [238 P.2d 597]), whereas when a resident alien or citizen fails to claim within the prescribed time, his portion reverts to the estate for distribution to other eligible heirs. No authority is cited to establish the second part of this proposition, [ ] [but assuming *arguendo* that claimants' statement may be correct, at least in some circumstances] it avails claimants nothing, for the discrimination charged is not against them. To challenge the constitutionality of a statute on the ground that it is discriminatory, the party complaining must show that he is a party aggrieved or a member of the class discriminated against. (In re Weisberg, 215 Cal. 624, 630 [12 P.2d 446]; DuBois v. Land, 212 Cal.App.2d 563, 567 [28 Cal. Rptr. 167].)

Claimants next contend that Probate Code, section 1026 is unconstitutional in that it deprives claimants of a vested property right without due process of law and contrary to international standards of justice. (See Rest.2d Foreign Relations Law, §§ 165, 166 and 185.) As we understand it, the argument is that once the state recognizes a vested property interest in a nonresident alien, it cannot thereafter deprive him of that property interest unreasonably, arbitrarily and without compensation. The problem is aggravated, it is suggested, by the fact that, of all persons, the nonresident alien is least likely to obtain actual notice from the types of notification prescribed in Probate Code, sections 1080 and 1200. These contentions misconceive the nature of the rights of succession by a nonresident alien in California and are not meritorious.

Subject to the treaty-making power of the national government (Zschernig v. Miller, 389 U.S. 429, 441 [19 L.Ed.2d 683, 692, 88 S.Ct. 664, 671]; Estate of Meyer, *supra*, 107 Cal.App.2d 799, 804), and subject to the exclusive and paramount power of the federal government to deal with foreign affairs (Zschernig v. Mill, *supra*, 389 U.S. 429 [19 L.Ed.2d 683]; Estate of Kraemer, *supra*, 276 Cal.App.2d 715) and subject to the equal protection and privilege and immunity guaranties of the United States Constitution, the state has full power to regulate the matter of the descent and distribution of decedents' estates within its borders. (Estate of Larkin, *supra*, 65 Cal.2d 60, 80-81 and authorities there cited.) California has seen fit to vest in nonresident alien heirs a conditional interest in a decedent's estate. "[T]he estate which vests in them upon the death of the ancestor is not an absolute or unconditional estate, as in the case of citizen heirs, subject only to be divested in the process of administration, but it is a conditional estate, upon the condition subsequent that if they fail to appear and claim the same within five years their right ceases and the property then vests in the state." (Estate of Romaris, *supra*, 191 Cal. 740, 744; Estate of Sorensen, *supra*, 44 Cal.2d 306, 308; Estate of Pendergast, *supra*, 143 Cal. 135, 140; Estate of Laurence, *supra*, 84 Cal.App.2d 500, 505-506.) Since the state has the power to withhold absolutely the right of succession but has seen fit to bestow upon nonresident aliens a vested but conditional property interest, we fail to see how the divestment of that interest by nonoccurrence of the condition upon which it was granted constitutes a deprivation of property without due process of law or contrary to standards of international justice. Nor can we perceive

how that conclusion is altered by the fact that nonresident aliens are not likely to obtain actual notice of the proceedings. As noted in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 [94 L.Ed. 865, 875, 70 S.Ct. 652, 658], ". . . it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. [Citations.]" Estate of Poder, 274 Cal.App.2d 786 [79 Cal.Pptr. 484], relied on by claimants, has no applicability to the case at bench.

Lastly, claimants, relying upon Zschernig v. Miller, *supra*, 389 U.S. 429 [19 L.Ed.2d 683, 88 S.Ct. 664], Estate of Kraemer, *supra*, 276 Cal.App.2d 715, and Bethlehem Steel Corp. v. Board of Commissioners, 276 Cal.App.2d 221 [80 Cal.Rptr. 800], contend that Probate Code, section 1026 constitutes an unconstitutional infringement on the exclusive and plenary power of the federal government to deal with foreign relations. The cases relied upon by claimants do not support the unconstitutionality of Probate Code, section 1026. Their rule is that state legislation is invalid as an infringement upon the federal power to deal with foreign relations when "it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." (Zschernig v. Miller, *supra*, 389 U.S. at p. 441 [19 L.Ed.2d at p. 692, 88 S.Ct. at p. 671); Bethlehem Steel Corp. v. Board of Commissioners, 276 Cal.App.2d at p. 229.) In both *Zschernig* (389 U.S. at pp. 434-435 [19 L.Ed.2d at pp. 688, 689, 88 S.Ct. at p. 667]) and *Bethlehem* (276 Cal.App.2d at p. 228) it was expressly found that the state legislation had "more than

'some incidental or indirect effect in foreign countries,' and . . . great potential for disruption or embarrassment. . . ." *Kraemer* involved a statute substantially identical to that in *Zschernig*, and the decision in *Kraemer* was completely controlled by *Zschernig*.

The matter of concern to the high court in *Zschernig* is revealed in the opinion as follows: "It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation—whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other represenatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation." (389 U.S. at pp. 433-434 [19 L.Ed.2d at p. 688, 88 S.Ct. at p. 667].)

"That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by Clark v. Allen." (389 U.S. at p. 436 [19 L.Ed.2d at p. 689, 88 S.Ct. at p. 668].)

Probate Code, section 1026 does not involve the state in any inquiry into foreign law, administration of foreign law, credibility of foreign governmental officials or any other matter condemned by *Zschernig*. All that is required by Probate Code, section 1026 is the computation of five years from the date of death of the decedent. The same time period applies to all non-resident aliens alike, regardless of their country of residence, its law or its policies.

It is suggested that, since many foreign countries have reciprocity provisions in their law similar to section 259 of the California Probate Code, the distinction between nonresident aliens and other persons inherent in section 1026 might cause those foreign countries to deny inheritance to all United States citizens. This argument is spurious. By virtue of our federal system, the laws of our 50 states are undoubtedly diverse in respect to the right of succession by nonresident aliens. Indeed, it appears that New Hampshire affords nonresident aliens no right to succeed to real estate at all. (Hanafin v. McCarthy (N.H. 1948) 57 A.2d 148; Lazarou v. Moraros (N.H. 1958) 143 A.2d 669.) It has not heretofore been suggested that the refusal of New Hampshire to accord such rights to nonresident aliens or the diverse laws of other states have deterred the finding that reciprocal rights of inheritance exist between California and the U.S.S.R. (See Estate of Larkin, *supra*, 65 Cal.2d 60.)

It is also suggested that Probate Code, section 1026 constitutes an embarrassment to the conduct of foreign relations in that the federal government will find it difficult to explain why an heir who "appears and demands" within the five-year period is permitted to inherit while one who appears and demands shortly after the expiration of the five-year period is not. The burden of such explanation is inherent in any statutorily prescribed period and, in any event, presumably, such explanation will cause no more embarrassment than the explanation why a nonresident alien may inherit property in California but not in New Hampshire.

Probate Code, section 1026 cannot be characterized as having a "direct impact upon foreign relations," nor is it likely to "adversely affect the power of the central

government to deal with" foreign relations. At most, its effect upon foreign relations is "incidental or indirect," and it does not unconstitutionally impinge upon the exclusive and plenary power of the federal government to deal with foreign affairs. (Zschernig v. Miller, *supra*, 389 U.S. 429 [19 L.Ed.2d 683, 88 S.Ct. 664]; Bethlehem Steel Corp. v. Board of Commissioners, *supra*, 276 Cal.App.2d 221.)

As to claimants Uliana Andreevna Gumen, Evdokia Andreevna Lavrik, Anna Ivanovna Petlevany and Vera Ivanovna Vinichenko the judgment is reversed and the trial court is instructed to enter judgment that the State of California is entitled by escheat to the distribution of the interests to which those claimants would otherwise have been entitled. Pursuant to rule 26(a) of the Rules of Court, each party shall bear his own costs.

Mosk, J., did not participate herein.

## EXHIBIT "B."

*Estate of Horman L.A. 29832.*

DISSENTING OPINION BY PETERS, J.

I dissent. The majority opinion holds that the interests of four claimants escheat to the State of California because of the provisions of Probate Code section 1026. In my opinion, under the facts of this case, this constitutes a great injustice to these four claimants.

In the first place, the state contends that section 1026 is not a statute of limitations but is part of the substantive law of inheritance. This is a matter of semantics. As the majority opinion points out this case was tried and appealed at a time when section 1026 could apply but was not raised by the state. One day, before the second trial, the state attempted to amend by raising this section. The trial court held that section 1026 was tolled. In so holding, the trial court was clearly correct. The provisions of section 1026 are subject to tolling under proper circumstances. (Estate of Caravas, 40 Cal.2d 33, 41-42; Estate of Spinosa, 117 Cal. App.2d 364, 370-372.) This was a proper case to toll the statute.

The Estate of Gogabashvele, 195 Cal.App.2d 503, was decided on September 12, 1961. The Estate of Larkin, 65 Cal.2d 60, disapproving the *Gogabashvele* case, was decided on August 2, 1966. This court had denied a hearing in the *Gogabashvele* case. What the majority opinion holds is that during this five-year period a reasonably competent attorney should pay no attention at all to the *Gogabashvele* case and the denial of hearing but should go to the Supreme Court and ask that court to disapprove. This is sheer non-

sense. An attorney, reasonably competent, is entitled to rely on a district court opinion, in which a hearing by this court has been denied, and is entitled to consider that that opinion correctly states the law. For this reason, section 1026, which is a statute of limitations, was tolled during this five-year period.

It is also the law that the statute of limitations is waived when it is not pleaded. (Bliss v. Sneath, 119 Cal. 526, 528; Taylor v. Sanford, 203 Cal.App.2d 330, 345.) Here, the state not only failed to plead the provisions of section 1026 at a time after the five-year period prescribed by section 1026 had passed, but proceeded to trial and then to appeal without raising the question. Under such circumstances there as a clear waiver.

It should also be mentioned that this is an escheat case. The state has no proper interest to escheat property that properly and legally belongs to someone else. Escheat statutes should be strictly construed.

For these reasons, I am of the opinion that the four claimants involved in this proceeding are entitled to their proper share of the estate.

Peters, *J.*

**EXHIBIT "C."**

February 19, 1969

Department of Justice
Office of the Attorney General
State Building
Los Angeles, California 90012

Attention: Elizabeth Miller, Deputy
Slaff, Mosk & Rudman
6290 Sunset Boulevard
Hollywood, California 90028

Attention: Edward Mosk

Re: PA 1026 Estate of Horman, John P. (Deceased)
Filed: February 19, 1969.

Gentlemen:

As indicated previously, the Court is convinced by the evidence beyond doubt that the decedent, John Horman, was also Yakov Pavlovich Gumen born in the U.S.S.R. in 1887. Further, the Court finds that the claimants appearing by counsel at the hearing of this matter are the surviving heirs of the decedent, and entitled to inherit his estate.

As to one branch of heirs, the Attorney General has also raised the failure to file a claim within the 5-year period set forth by Probate Code Section 1026. To this contention, the claimants argue broadly that Probate Code Sections 259, 1026 and 1027 are unconstitutional, and in addition that the 5-year period for filing was tolled.

The Court holds that Probate Code Section 259 and 1026 are constitutional. Section 259 does not involve California courts in the field of foreign policy. It ap-

plies equally to non-resident aliens of all countries which have reciprocity of inheritance, whether it be Mexico or Canada, Russia or Red China. Sections 1026 (and 1027) do no doubt establish a different and shorter period for non-resident aliens to file their claims. However, this Court is not persuaded either (1) that non-resident alien heirs are protected by the U. S. Constitution entitling them to due process and equal protection, nor (2) that even if they should be, that the shorter 5-year period would be a denial of due process or equal protection.

The Court also holds, however, that the 5-year period of Section 1026 of the Probate Code was tolled from the date of the decision of *Estate of Gogabashvele*, 195 CA(2) 503, decided Sept. 12, 1961, to the date of decision of *Estate of Larkin*, 65 C(2) 60, decided August 2, 1966.

The effect of *Gogabashvele* was that Probate Code 259 prohibited any effective claim by a non-resident alien of the U.S.S.R. to an inheritance from any California estate. The California Supreme Court denied a hearing of *Gogabashvele* on November 8, 1961, and it remained the law of California for those five years. *Housing Authority vs Peters*, 120 CA(2) 615; *DiGenova vs State Board of Education*, 57 C(2) 167, 178.

CCP 356 tolls the running of the 5-year period of Probate Code 1026, if any statute stays the commencement of the filing of the claim. *Estate of Caravas*, 40 C(2) 33. In addition, the Supreme Court in Caravas extended the tolling of the time to file a claim under Probate Code 1026, beyond the express wording of CCP 354-256, to include situations where "a plain-

tiff has been denied access to the courts". (40 C(2) 40). It is interesting to note that *Gogabashvele* was the apparent law of California for more than 4½ of the 5 years that the heirs here had to file their claims after Mr. Horman's death on December 25, 1961. Obviously, they did have the *ability to file* a claim in that period (and most heirs did) but the claims would be apparently doomed to failure by the prevailing interpretation by *Gogabashvele* of Section 259. Under these circumstances, it is this Court's opinion that they were denied access to the California Courts.

Counsel for claimants will prepare such Findings and Judgment as may be required.

Very truly yours,

JAMES F. JUDGE
James F. Judge

JFJ:rp

**Findings of Fact and Conclusions of Law.**

Superior Court of the State of California, for the County of Orange.

In the Matter of the Estate of John P. Horman, etc., et al., Deceased. No. PA 1026.

Filed: March 17, 1969.

The above entitled matter came on regularly for retrial after reversal of previous judgment in the District Court of Appeal (265 ACA 905) on the 4th and 5th days of February, 1969 before the Honorable JAMES F. JUDGE presiding in Department 11 of the above entitled court. The matter was submitted on February 5, 1969 and the court filed its intention to give judgment on February 19, 1969 together with a letter addressed to all counsel setting forth the basis of said decision. SLAFF, MOSK & RUDMAN by Edward Mosk and Leon Goldin appeared as counsel for claimants and THOMAS LYNCH, Attorney General of the State of California, by Elizabeth Miller, Deputy Attorney General, appeared as counsel for respondent and petitioner, the State of California. The Court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted for decision and the court being fully advised in the premises and having determined that all notices required by law were given, makes its Findings of Fact as follows:

IT IS TRUE THAT:

1. JOHN P. HORMAN died intestate on December 25, 1961 in the County of Orange, State of California leaving an estate in said County consisting of real and personal property.

2. Letters of Administration were duly issued to the Public Administrator of Orange County on January 12, 1962.

3. Notice of Creditors has been duly given, published and filed as required by law.

4. Decedent left no surviving spouse.

5. John Horman was born JAKOB (YAKOB) PAVLOVICH GUMEN.

6. John Horman is survived by his sister VASILISA (WASILISA) PAVLOVNA MALENKO.

7. John Horman's brother MATVEI PAVLOVICH GUMEN predeceased him leaving as his heirs his children, MARFA MATVEEVNA BATRAK, SERGEI MATVEEVICH GUMEN, ANNA MATVEEVNA SISOVEA (SYSOEVA) and the children of his daughter NINA MATVEEVA BELOTZKAYA, namely ELENA VASILIEVA (VASILYEVNA) DEREVIANKO (DEREVYANKO), NADEZHDA ANDREEVNA BELOTSKY (BELOTZKAYA), NIKOLAI (NIKOLAY) ANDREEVICH BELOTZKY (BELOTSKAYA), LEONID ANDREEVICH BELOTSKY and VALERIY SERAFIMOVICH BELOTSKY (BELOTZKIY).

8. John Horman's brother SVIRID PAVLOVICH GUMEN predeceased him leaving as his heirs his children PETR SVIRIDOVICH GUMEN, AGRAFENA SVIRIDOVNA KUZETZOVA, NINA SVIRIDOVNA GUMEN, VERA SPIRIDONOVNA (SVIRIDOVNA) PANASUK (PANASIUK), ELIZAVETA SPIRIDONOVNA (SPIRIDOVNA) KULAKOVA, NADEZHDA SVIRDOVNA TROTZENKO and the children of his daughter ANNA SVIRIDOVNA BASAY, namely ALLA ALEKSEEVNA BASAY, NINA ALEKSEE-

VNA DOROZHKIN (DOROZHKINA), GENADY (GENNADY) ALEKSEEVICH BASAY and ALEKSANDER (ALEKSANDR) ALEKSEEVICH BASAY.

9. John Horman's half-brother ANDREI ALESKSEEVICH LAVRIK predeceased John Horman leaving as his heirs his children STEPAN ANDREEVICH LAVRIK, ULIANA ANDREEVNA GUMAN, EVDOKIA ANDREEVNA LAVRIK and the children of his son IVAN LAVRIK, namely ANNA (GANNA) IVANOVNA PETLEVANY (PETLEVANYA) and VERA IVANOVNA (WINICHENKO) VINICHENKO.

10. All of said heirs of JOHN HORMAN are residents and citizens of the Union of Soviet Socialists Republics. Reciprocal rights of inheritance exist between the United States and the USSR as set forth in the decision of the Supreme Court of the State of California in *Estate of Larkin,* 65 C2d 60, 416 P2d 273.

11. Claimants ULIANA GUMEN, EVDOKIA LAVRIK, ANNA PETLEVANY and VERA VINICHENKO did not appear in this action until February 23, 1967. It is true that said claimants had no effective manner in which to appear herein during the period of time commencing with the opening of the within estate and ending upon their appearance herein in that between November 8, 1961 when hearing was denied by the Supreme Court of California in *Estate of Gogobashvele,* 195 CA2d 503, and August 2, 1966 when the Supreme Court changed the law of California in *Estate of Larkin,* 65 C2d 60, the law of the State of California prevented alien heirs residing in the USSR, irrespective of the merits of their claims in California estates, from inheriting their shares of California es-

tates by reason of the operation of Probate Code 259 as interpreted in *Estate of Gogobashvele*. That to have required said claimants to have appeared herein under such state of law would have required them to perform an idle act in that said claimants, during such period, were unable to obtain any effective relief in the courts of this state, and to that extent the courts of this state were effectively closed to them.

12. No other person appeared to make any claim of heirship in this estate and the court finds that there are no heirs other than as set forth in these Findings of Fact and Conclusions of Law.

IT IS NOT TRUE that the State of California is entitled to distribution of the estate as escheated property by reason of its claim that there are no heirs entitled to take.

WHEREFORE, from the foregoing facts the court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. VASILISA (WASILISA) PAVLOVNA MALENKO as the sister of the decedent is entitled to disribution of one-fourth (¼) of the estate of the decedent.

2. That the children of MATVEI PAVLOVICH GUMEN, the brother of the decedent, are entitled to share one-quarter (¼) of the estate of the decedent in the following proportions:

A. MARFA MATVEEVNA BATRAK, one-sixteenth (1/16)

B. SERGEI MATVEEVICH GUMEN, one-sixteenth (1/16)

C. ANNA MATVEEVNA SISOEVA (SYSOEVA), one-sixteenth (1/16)

D. ELENA VASILIEVNA (VASILYEVNA) DEREVIANKO (DEREVYANKO), one-eightieth (1/80)

E. NADEZHDA ANDREEVNA BELOTSKY (BELOTZKAYA), one-eightieth (1/80)

NIKOLAI (NIKOLAY) ANDREEVICH BELOTZKY (BELOTSKAYA), one-eightieth (1/80)

G. LEONID ANDREEVICH BELOTSKY, one-eightieth (1/80)

H. VALERITY SERAFIMOVICH BELOTSKY (BELOTZKIY), one-eightieth (1/80)

3. That the children of SVIRID PAVLOVICH GUMEN, the brother of the decedent, are entitled to share one-quarter (¼) of the estate of the decedent in the following proportions:

A. PETR SVIRIDOVICH GUMEN, one twenty-eighth (1/28)

B. AGRAFENA SVIRIDOVNA KUZENTZOVA, one twenty-eighth (1/28)

C. NINA SVIRIDOVNA GUMEN, one twenty-eighth (1/28)

D. VERA SPIRIDOVNA (SVIRIDOVVNA) PANASUK (PANASIUK), one twenty-eighth (1/28)

E. ELIZAVETA SPIRIDONOVNA (SPIRIDOVNA) KULAKOVA, one twenty-eighth (1/28)

F. NADEZHDA SVIRIDOVNA TROTZENKO, one twenty-eighth (1/28)

G. ALLA ALEKSEEVNA BASAY, one one-hundred and twelfth (1/112)

H. NINA ALEKSEEVNA DOROZHKIN (DOROZHKINA), one one-hundredth and twelfth (1/112)

I. GENADY (GENNADY) ALEKSEEVICH BASAY, one one-hundreth and twelfth (1/112)

J. ALEKSANDER (ALEKSANDR) ALEKSEEVICH BASAY, one one-hundredth and twelfth (1/112)

4. The children of ANDREI ALESEEVICH LAVRIK, the half-brother of the decedent, are entitled to share one-quarter (¼) of the estate of the decedent in the following proportions:

A. STEPAN ANDREEVICH LAVRIK, one-sixteenth (1/16)

B. ULIANA ANDREEVNA GUMEN, one-sixteenth (1/16)

C. EVDOKIA ANDREEVNA LAVRIK, one-sixteenth (1/16)

D. ANNA (GANNA) IVANOVNA PETLEVANY (PETLEVANYA), one thirty-second (1/32)

E. VERA IVANOVNA (WINICHENKO) VINICHENKO, one thirty-second (1/32).

5. Probate Code 1026 requiring alien heirs to claim within five years of date of death of the decedent was tolled between September 12, 1961 and August 2, 1966; all heirs set forth herein claimed their respective shares of the estate in compliance with the requirements of Probate Code 1026.

6. All Findings of Fact herein expressed as Conclusions of Law are hereby expressly adopted as Findings of Fact as though set forth in full herein; all Con-

clusions of Law herein expressed as Findings of Fact are hereby expressly adopted as Conclusions of Law as though set forth in full herein.

A Decree is hereby ordered to be entered accordingly.

DATED: This 17 day of March, 1969.

/s/ James F. Judge
JAMES F. JUDGE
Judge of the above entitled court

## APPENDIX "D".

### United States Constitution Fourteenth Amendment.

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Constitution Article 1, Section 8.

Section 8. The Congress shall have Power . . . To regulate Commerce with foreign Nations, . . .

### California Probate Code Sections 1026 and 1027.

§1026. *Nonresident alien succeeding to property; appearance and demand; escheat*

A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property. (Added Stats. 1933, c. 969, p. 2495 § 13.)

§ 1027. *Time for application for distribution; distribution to state; claims Application; time; notice, hearing; undistributed portion.*

Executors or administrators, public or otherwise, must apply for distribution of an estate at the time of

filing a final account. Notice of such application must be given in the manner provided in Section 1200 of the Probate Code. If the court, at the time set for the hearing of the final account, or such time thereafter to which the matter may be continued, does not distribute the entire balance of the estate remaining for distribution to known heirs, devisees or legatees entitled to succeed thereto, it must distribute to the State of California that portion of such estate not distributed to such known heirs, devisees or legatees. Insofar as practical, any real property or tangible personal property shall be converted to money prior to transmittal to the state.

*Service on state controller.*

Whenever it appears that the estate or any portion thereof is to be distributed to the State of California because there are no known heirs or that the estate or any portion thereof is to be distributed to heirs, devisees or legatees whose whereabouts are unknown, the executor or administrator must serve the State Controller, personally or by mail, with a copy of the petition for distribution, together with notice of the hearing thereon, specifying the date of such hearing, and a copy of the latest account filed with the court, at least 30 days prior to the date of such hearing.

*Title of state.*

If the court distributes the estate or any portion thereof to the State of California, and the distributing clause contains words otherwise creating a trust in favor of certain unknown or unidentified persons as a class, such distribution shall vest in the State of California both legal and equitable title to the property so distributed; saving, however, the right of claimants to ap-

pear and claim the estate or any portion thereof, as in this section provided.

*Delivery to state treasurer and state controller.*

Upon the rendition of a decree of distribution, any money distributed to the State of California shall forthwith be delivered to the State Treasurer by the executor or administrator, and all other personal property so distributed shall forthwith be delivered to the State Controller for deposit in the State Treasury.

*Certified copy of decree.*

A certified copy of the decree of distribution and of any court orders amending the same must be delivered to the State Controller by the executor or administrator at the time of making any remittance in connection with an estate.

*No deposit in county treasury.*

No deposit of property in an estate shall be made in the county treasury by any executor or administrator, public or otherwise, if the estate has previously been distributed to the State of California pursuant to this section, but such estate shall be transmitted forthwith to the State Treasurer or State Controller as provided in this section.

*Limitation of claims.*

The property so distributed shall be held by the State Treasurer for a period of five years from the date of the decree making such distribution, within which time any person may claim the estate or any part thereof in the manner provided by Title 10 (*commencing with Section 1300*) of Part 3 of the Code of Civil Procedure. Rights of nonresident aliens shall be governed by the provisions of Section 1026 of this code.

*Failure on claims.*

Any person who does not appear and claim, as herein required, shall be forever barred, and such property, or so much thereof as is not claimed, shall vest absolutely in the state.

**Code of Civil Procedure Section 1430.**

§ 1430. *Permanent escheat; time; rights of persons under disability; presumption.*

Upon the expiration of five years after the date of entry of judgment in any proceeding had under this chapter, or upon the expiration of five years after completion of notice by publication in an escheat action taken under the provisions of Section 1415, the property covered by such proceeding or action is permanently escheated to the State; saving however to infants, and persons of unsound mind, the right to appear and claim such property as provided in this title; but it shall be presumed that there are no such infants nor persons of unsound mind who are or will be entitled to claim such property unless and until they appear and claim such property as provided in this title; provided, however, such presumption shall be conclusive in favor of any purchaser in good faith and for a valuable consideration from the State and everyone subsequently claiming under him, saving however, to infants and persons of unsound mind the right of recourse to the proceeds of any sale or other disposition of any such property by the State and as herein provided. (Added Stats.1951, c. 1708 p. 3951, § 5. As amended Stats. 1951, c. 1738, p. 4148, § 3.)

IN THE

# Supreme Court of the United States

FILED
1971
E. ROBERT SEAVER, CLERK

October Term, 1971

No. 71-[illegible]

GUMEN, *et al.*,

*Petitioners,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

On Writ of Certiorari to the Supreme Court of the State of California

## BRIEF OF RESPONDENT IN OPPOSITION.

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IN THE

# Supreme Court of the United States

October Term, 1971
No. 71-153

GUMEN, *et al.*,

*Petitioners,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of California**

## BRIEF OF RESPONDENT IN OPPOSITION.

### Preliminary Statement.

The petitioners seek a writ of certiorari from this Court to the California Supreme Court to review its decision holding that California Probate Code, Section 1026, which requires a nonresident alien heir to appear and demand his inheritance within five years after succession thereto, or lose all right to such inheritance, is constitutional; that the petitioners had not appeared and demanded their inheritances within the five years required by said California Probate Code Section 1026; that the petitioners therefore lost all right to said inheritances; and that at the end of said five years said inheritances escheated to the State of California as provided by said Probate Code, Section 1026. The opinion

of the California Supreme Court, filed June 10, 1971, is reported at 5 Cal. 3d 62. The Petition for Writ of Certiorari was filed on September 9, 1971.

**Jurisdiction.**

The petitioners invoke the jurisdiction of this Court pursuant to Title 28, Section 1257 (3), United States Code.

**Questions Presented.**

1. Whether California Probate Code, Section 1026, which limits the right of a nonresident alien heir to succeed to a vested interest in a California decedent's estate subject to a condition subsequent that he appear and demand his inheritance within five years from the date of the death of the decedent, while placing no such condition subsequent upon the estate succeeded to by any other heir, denies the nonresident alien heir the equal protection of the law and the due process of law.

2. Whether California Probate Code, Section 1026, which limits the right of a nonresident alien heir to succeed to a vested interest in a California decedent's estate subject to a condition subsequent that he appear and demand his inheritance within five years from the date of the death of the decedent, while placing no such condition subsequent upon the estate succeeded to by any other heir, is an unconstitutional infringement upon the exclusive power to regulate commerce with foreign nations which is granted to Congress by Article I, Section 8 of the United States Constitution.

**Statement of the Case.**

On December 25, 1961, John Horman died intestate in California, leaving an estate in excess of $450,000. An administrator of the estate was appointed by the Court in January of 1962, and in January of 1965 the State of California filed a petition seeking from the probate court a determination of heirship, alleging that there were no heirs to take the estate, and asking that it be distributed to the State as escheated property pursuant to the laws of the State of California.

Within five years from the date of death, twenty persons, all citizens and residents of the USSR, claiming to be heirs of the decedent "appeared and demanded" their interests in the estate by filing, by their attorney, statements of interest in the heirship proceeding then pending in the probate court.

On March 17, 1967, more than five years after the date of the death of the decedent, a statement of interest was filed on behalf of the four petitioners herein, all of whom were citizens and residents of the USSR.

The first trial of the question of heirship resulted in an order holding that the claimants had not proved their relationship to the decedent and their entitlement to the estate, and that the estate should be distributed to the State of California as escheated property. This order was reversed on appeal for abuse of the discretion of the trial judge in not granting the claimants' motion for a new trial. (*Estate of Horman,* 265 Cal. App.2d 796 (1968).)

The State filed an answer to the claim of the petitioners herein, pointing out that they had not appeared and demanded any shares of the estate within five years from the date of the death of the decedent, and that therefore any rights in the estate to which they might have succeeded had terminated and their interests escheated to the State.

The retrial of the question of heirship resulted in an order holding that each of the claimants was an heir of the decedent and entitled to take a portion of his estate by succession. The court ruled that the petitioners herein had not lost their interests in the estate by failing to appear and demand such interests within five years from the date of the death of the decedent as provided by California Probate Code, Section 1026, because *Estate of Gogabashvele*, 195 Cal.App.2d 503 (1961), decided in 1961 and overruled in 1966, holding that lack of reciprocal rights of inheritance between the United States and the USSR prevented citizens and residents of the USSR from succeeding to that estate, would, during the period of its viability, have rendered an appearance and demand by the petitioners here an idle act, and would have prevented them from obtaining any effective relief in the courts of the State of California, thus tolling the statute during that period.

On appeal by the State of California, the order was reversed by the Supreme Court of the State of California insofar as it held that the petitioners herein were not barred from taking a share of the estate by virtue of California Probate Code, Section 1026, and the trial court was instructed to enter judgment that the State of California was entitled by escheat to the interests to which the petitioners here would have been entitled had

they appeared and demanded such interests within five years from the date of the death of the decedent as provided in said Probate Code, Section 1026. (*Estate of Horman*, 5 Cal.3d 62 (1971).)

## ARGUMENT.

### I.

### The California Law Limiting the Right of a Nonresident Alien Heir to Succeed to a Vested Interest in a Decedent's Estate Subject to the Condition That He Appeal and Demand His Inheritance Within Five Years From the Date of the Death of the Decedent, While Placing No Such Condition Upon the Estate Succeeded to by Any Other Heir, Violates Neither the Equal Protection nor the Due Process Provisions of the Fourteenth Amendment to the United States Constitution.

The petitioners contend that the California law which grants to nonresident alien heirs only a vested interest in the estate of a decedent subject to the condition subsequent that they appear and demand their inheritances within five years from the date of the death of the decedent, while placing to such condition upon the estate succeeded to by any other heir, violates their federal constitutional right to the equal protection of the laws and the due process of law guaranteed to them by the Fourteenth Amendment of the United States Constitution.

The law of nations and of the United States recognizes the liberty of every government to give to foreigners only such rights touching property within its territory as it may see fit to bestow, and in the United States this authority is primarily in the States (*Patsone v. Pennsylvania*, 232 U.S. 138, 145-146 (1913)), subject to dominant rights given by the constitution to the federal government. (*Zschernig v. Miller*, 389 U.S. 429, 440 (1968); see *Blythe v. Hinckley*, 127 Cal. 431, 436-437 (1900); Whiteman, Digest of International Law, Vol. 8, pp. 462-463 (1967).) Subject to

such federal rights, the state has full power to regulate the matter of the descent and distribution of decedents' estates within its borders. Nothing in the federal constitution forbids the legislature of a state to limit, condition, or even abolish the right to succession within its jurisdiction. (*Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).)

The equal protection guarantee of the Fourteenth Amendment of the United States Constitution applies by its very language only to "any person within its [the state's] jurisdiction," and there is some indication that it is inapplicable to nonresident aliens. (*Johnson v. Eisentrager*, 339 U.S. 763, 771 (1949).) However, the petitioners here assert that the granting of an interest in the decedent's estate, albeit a conditional one, to them brought them within the jurisdiction of the state and guaranteed to them the equal protection of the laws.

Here, the only property interest which the State of California bestowed upon the petitioners was a conditional estate, subject to the contingency that if they failed to appear and demand it within five years after the date of the death of the decedent, their rights ceased. The state action which gave them the right limited the right, as it could constitutionally do. No state action took anything away from them—they did not have an unconditional right to begin with, and their own inaction, not the action of the state, defeated it. Therefore, when they first appeared in the State of California they had no property rights left therein, and therefore, we submit, there was no basis upon which they could assert any rights to the equal protection of the law.

The equal protection clause creates no new rights; it does not guarantee any minimum of protection, but

merely requires that persons similarly situated receive equal treatment. (*Skinner v. Oklahoma*, 316 U.S. 535, 540-542 (1942).) The only equality guaranteed is equality under the same conditions, and among persons similarly situated. The legislature may make a reasonable classification of persons and activities, and pass special legislation applying to certain classes. The classification must not be arbitrary, but must be based upon some difference in the class having a substantial relation to a legitimate object to be accomplished. (*Morey v. Doud*, 354 U.S. 457, 465 (1957).) It must be presumed that any statutory discrimination between classes which are in fact different is relevant to a permissible legislative purpose, and it will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it. (*Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 557-558 (1947); *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961).)

The California law granting to nonresident aliens only a vested right to a decedent's estate, subject to the condition that he appear and demand it within five years, has two purposes, both of which, we submit, constitute legitimate state concerns. The state has a legitimate concern that property within its borders should have an ascertainable title within a reasonable period of time so that it can be sold, developed and otherwise dealt with, and the statute fixes a time at which title can be definitely ascertained. The second purpose is the state's preferring itself, quit permissibly, over nonresident aliens who have not appeared, from lack of interest or otherwise, and demanded their interest within five years.

The distinction between nonresident alien heirs and other heirs is rationally related to these purposes. Citi-

zens and resident aliens are likely to have substantial contacts and relationships with the state, directly or indirectly through the federal and state governments which nonresident aliens lack completely. In recognition of these connections and relationships, it is reasonable for the state to defer its power of escheat as to citizens and resident aliens for a longer period than as to nonresident aliens.

The existence of unascertainable property titles constitutes a problem for and a burden on the state, and final escheat of the property to the state in an ascertainable time contributes to its relief from such problem and burden. And it is not unreasonable for the state, in deference to and recognition of its more probable relationship to and connection with citizens and resident aliens, to allow the latter persons a somewhat longer period in which to claim their successions prior to final escheat than that accorded to nonresident aliens.

Therefore, even though it should properly be held that the petitioners herein were not persons protected by the equal protection clause because they had neither property nor presence within the state at the time of their first appearance therein, it must be held, we submit, that they were not in any event, denied the equal protection of the laws, because the law which classified them and gave them rights of succession more limited than those given to other persons is based on a reasonable difference in the class which they represent which has a substantial relation to a legitimate object.

As the state has, as set forth above, the power to withhold the right of succession to all, but has seen fit to allow a nonresident alien to succeed to a vested but conditional property interest, we submit that the

nonoccurrence of the condition, particularly when caused by the nonaction of the recipient of the interest, and the consequent divestment of that interest, could not, and did not here, deprive a nonresident alien of the due process of law required by the constitution.

II.

**The California Law Limiting the Right of a Nonresident Alien Heir to Succeed to a Vested Interest in a Decedent's Estate Subject to the Condition That He Appear and Demand His Inheritance Within Five Years From the Date of the Death of the Decedent, While Placing No Such Condition Upon the Estate Succeeded to by Any Other Heir, Does Not Infringe Upon the Exclusive Power of Congress to Regulate Commerce With Foreign Nations.**

The petitioners assert that California Probate Code, Section 1026, violates the fundamental requirements of International Law, embarrasses our federal government in its dealing with foreign nations, creates difficulties with foreign powers and detrimentally affects our foreign relations, and is therefore an unconstitutional infringement upon the exclusive power to regulate commerce with foreign nations which is granted to Congress by Article I, Section 8 of the United States Constitution.

The petitioners point out that Restatement, Foreign Relations Law 2d, sections 166 and 185, provide that an alien may not be discriminated against even though he is not a resident if he has lawfully acquired an interest in property subject to the jurisdiction of the state, and that property of a nonresident alien may be taken only if a reasonable provision is made for payment of just compensation. They contend that California Probate Code, Section 1026 which requires a nonresident

to appear and demand his inheritance within five years from the date of the death of the decedent deprives them of a property right without compensation, that it is therefore a violation of International Law, and consequently constitutes a violation of the exclusive right of Congress to regulate commerce with foreign nations.

Here, as has been set out in Point I hereof, the only property interest which the petitioners acquired was one which was a conditional estate, subject to the contingency that if they failed to appear and claim the same within five years, their rights ceased. The state action which gave them the right limited the right. No state action took anything away from them—they did not have an unconditional right to begin with, and their own inaction, not that of the state, defeated it.

Therefore, we submit, no "injury" to an alien committed by a state, such as that referred to in the Restatement, Foreign Relations Law 2d, referred to by the petitioners, was committed here.

The next questions presented is, then, to what extent the state may prescribe limitations on the descent of estates to aliens without interfering with the federal government's exclusive power to regulate foreign affairs. It is not every real or possible effect on foreign relations which is forbidden to the states. Thus, in *Clark v. Allen,* 331 U.S. 503, 517 (1949), an "incidental" or "indirect" effect was held to be constitutional. Further, a state may impose a tax upon the succession by aliens to property within its jurisdiction which tax is not applied to citizens of the United States (*Magoun v. Illinois Trust & Savings Bank,* 170 U.S. 283), and may discriminate between nonresident aliens and those residing in the United States. (*Moody v. Hagen,* 36 N.D. 471 (1917).) Thus, it is not every act of the state

which treats aliens in a manner different from that with which it treats citizens or resident aliens which constitutes an interference in the power of the federal government to regulate foreign affairs.

We submit that the simple requirement of Probate Code, Section 1026 that in order to eliminate the conditional nature of the estate to which he has succeeded, a nonresident alien must appear and demand such estate within five years could have at the very most an "incidental" and "indirect" effect on foreign affairs, which is not an unconstitutional action of the state.

The claimants' assertion that it would be so embarrassing to envoys of the United States to try to explain why some heirs are entitled to inherit and some are not, because of the provisions of Probate Code section 1026, that the ability of the United States to regulate foreign affairs would be seriously impaired is, we submit, speculative in the extreme. Our envoys have presumably been explaining without unconstitutional embarrassment for years why an alien in New Hampshire has been unable to inherit real property there (*Lazarou v. Moraros* (New Hampshire) 143 A.2d 669 (1958)), while another alien may be able to inherit similar property in California.

The cases cited by the claimants in support of their argument that the code section in question is unconstitutional interference with the power of the federal government are those in which it was held that the state action did in fact interfere with some exclusive power of the federal government. Thus, for example, in *Bethlehem Steel Corp. v. Board of Commissioners,* 276 A.C.A. 266 (1969), the law imposed an embargo on foreign products, action which clearly and directly affected foreign affairs. The state action in *Purdy & Fitzpatrick v.*

*State of California,* 71 A.C. 587 (1969), interfered with the federal right to regulate immigration. *Zschernig v. Miller,* 389 U.S. 429 (1968), held that the application of the Oregon statute in a way which allowed the courts to evaluate the administration of foreign law, the credibility of diplomatic statements, the general policies of the foreign government and other criteria, which were clearly foreign affairs matters within the enumerated powers of the national government, was unconstitutional. The Court did not hold that state action which affected alien inheritances was unconstitutional *per se.* (See *State Probate Laws and Alien Heirs—The Zschernig Legacy,* 21 Baylor Law Review 450; *Alien Succession Under State Law: The Jurisdictional Conflict,* 20 Syracuse Law Review, 661; *Alien Inheritance Statutes and the Foreign Relations Power,* Duke Law Journal, Vol. 1969:153; *Nonresident Alien Inheritance Statutes and Foreign Policy—a Conflict?,* 47 Oregon Law Review 390.)

The law here under attack applies to nonresident aliens of every nationality whatsoever, indiscriminately, unless superceded by treaty. (*E.g., Estate of Romasis,* 191 Cal. 740.) Indeed, the federal government implicitly recognizes the right and habit of the various states to regulate inheritance and ownership of property within such states, by including in many treaties specific provisions regarding inheritance by nationals of the contracting parties. (See, TREATY PROVISIONS IN FORCE BETWEEN THE UNITED STATES OF AMERICA AND OTHER COUNTRIES RELATING TO RIGHTS OF INHERITANCE, ACQUISITION, AND OWNERSHIP OF PROPERTY. Compiled by the Office of the Assistant Legal Adviser for Treaty Affairs, United States Department of State, June 1, 1971.)

We submit, therefore, that California Probate Code, Section 1026 cannot be characterized as having a direct impact upon foreign relations, nor will it adversely affect the power of the central government to deal with foreign relations. At most, its effect upon foreign relations can be only incidental and indirect, and therefore it does not unconstitutionally impinge upon the exclusive and plenary power of the federal government to regulate foreign affairs.

**Conclusion.**

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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